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In The

Supreme Court of the United States

October Term, 1989

PAULINE W. KITTS,

Petitioner,

v.

GENERAL MOTORS CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The United States Court of Appeals for the Tenth Circuit followed an earlier decision of the First Circuit, and held that federal law impliedly preempts a state common-law claim that a car is defective because it was equipped with one restraint system option granted by federal law, seat belts, not a different option, airbags. All federal and state appellate courts to address the question, and a host of trial courts, are in accord with the First and Tenth Circuits. Should this Court review the Tenth Circuit's decision?

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INTRODUCTION

The Tenth Circuit held that federal law preempts petitioner's common-law claim that a car is defective because it was equipped with one restraint system option granted by federal law, seat belts, not a different option, airbags. The decision is in accord with every state and federal appellate court to address the question and dozens of trial courts all across the country.

This is not the first time the Court has been asked to address the issue. Just last term, a petition was filed seeking review of a decision of the Minnesota Court of Appeals, the first appellate court to address the issue, finding airbag claims preempted, and this Court declined

to review it. *Wickstrom v. Maplewood Toyota, Inc.*, 416 N.W.2d 838 (Minn. App. 1987), *cert. denied*, ___ U.S. ___, 108 S. Ct. 2905 (1988). Since then, a petition for certiorari has been filed in *Wood v. General Motors Corp.*, No. 89-46, seeking review of the First Circuit's finding that airbag claims are preempted. General Motors filed its opposition to that petition on August 25, 1989, and that matter is still pending.

The Tenth Circuit adopted and followed the *Wood* decision. General Motors has already explained why review of *Wood* is unnecessary in its brief opposing the *Wood* petition for certiorari, and those arguments apply equally here. We do not wish to burden the Court with a repetition of them; instead, we respectfully refer the Court to General Motors' brief in *Wood*.[1]

We will repeat, however, that there is remarkable – maybe unprecedented – unanimity in the courts around the country that airbag claims are preempted by federal law. *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988); *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989); *Nissan Motor Corp. v. Superior Court*, ___ Cal. App. 3d ___, 261 Cal. Rptr. 80 (Ct. App. 1989); *Gardner v. Honda Motor Co.*, 145 A.D.2d 41, 536 N.Y.S.2d 303 (N.Y. App. Div. 1988), *appeal dismissed*, 74 N.Y.2d 715, 543 N.Y.S.2d 401 (1989); *Wickstrom v. Maplewood Toyota, Inc.*, 416 N.W.2d 838 (Minn. App. 1987), *cert. denied*, ___ U.S. ___, 108 S. Ct. 2905 (1988); *Pokorny v. Ford Motor Co.*, 714 F.

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[1] With this brief General Motors also has served petitioner's counsel with a copy of General Motors' Brief in Opposition to Petition for Certiorari in the *Wood* case ("*Wood* Opposition").

Supp. 739 (E.D. Pa. 1989) (on appeal to Third Circuit); *Surles v. Ford Motor Co.*, 709 F. Supp. 732 (N.D. Tex. 1988); *Kelly v. General Motors Corp.*, 705 F. Supp. 303 (W.D. La. 1988); *Kolbeck v. General Motors Corp.*, 702 F. Supp. 532 (E.D. Pa. 1988); *Staggs v. Chrysler Corp.*, 678 F. Supp. 270 (N.D. Ga. 1987); *Hughes v. Ford Motor Co.*, 677 F. Supp. 76 (D. Conn. 1987); *Wattelet v. Toyota Motor Corp.*, 676 F. Supp. 1039 (D. Mont. 1987); *Schick v. Chrysler Corp.*, 675 F. Supp. 1183 (D.S.D. 1987); *Baird v. General Motors Corp.*, 654 F. Supp. 28 (N.D. Ohio 1986); *Cox v. Baltimore County*, 646 F. Supp. 761 (D. Md. 1986); *Vanover v. Ford Motor Co.*, 632 F. Supp. 1095 (E.D. Mo. 1986); *Heftel v. General Motors Corp.*, 1988 Westlaw 19615 (D.D.C. Feb. 23, 1988); *Hunter v. General Motors Corp.*, Prod. Liab. Rep. (CCH) ¶ 12,039 (D. Conn. Dec. 27, 1988); *Howard v. American Motors Corp.*, Prod. Liab. Rep. (CCH) ¶ 11,955 (S.D. Tex. July 6, 1988); *Bass v. General Motors Corp.*, 1987 Westlaw 54449 (W.D. Tex. 1987); *Vasquez v. General Motors Corp.*, 1986 Westlaw 18670-71 (D. Ariz. 1986).[2] Those cases are plainly right, under settled principles laid down by this Court. *See Wood* Opposition, pp. 11-15.

The petition should be denied.

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[2] In addition to the published decisions, dozens of unpublished decisions hold airbag claims preempted. *See, e.g., Hunt v. Ford Motor Co., Inc.*, No. 88-AR-1756 (N.D. Ala. March 30, 1989); *Falk v. Chrysler Corp.*, No. R-87-1057 (D. Md. Feb. 24, 1989); *Rodriguez v. General Motors Corp.*, No. CV88 3361 SWV (GX) (C.D. Cal. Oct. 4, 1988); *Ritt v. General Motors Corp.*, No. 86 C 1737 (N.D. Ill. Jan. 20, 1988); *Distler v. General Motors Corp.*, Civ. No. 4-86-821 (D. Minn. Sept. 8, 1987); *Donnelly v. General Motors Corp.*, No. 86-576-JU (D. Or. Aug. 3, 1987); *Dever v.*

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REASONS FOR DENYING THE WRIT

Petitioner offers no reason to grant review here. She says the Tenth Circuit violated the separation of powers,

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Langthorp, No. 85-53451 (Tex. Dist. Ct. Aug. 24, 1989); *Seemann v. General Motors Corp.*, No. 86-6145 (CL) "AI" (Fla. Cir. Ct. Aug. 31, 1989); *Kane v. Mitsubishi Motor Sales of America Inc.*, No. 9649/88 (N.Y. Sup. Ct. June 19, 1989); *Schwartz v. Volvo*, North Am. Corp., No. CV86-7701 (Ala. Cir. Ct. Mar. 10, 1988), *aff'd on other grounds*, ___ So. 2d ___, No. 87-1272 (Ala. 1989); *Matthews v. Chrysler Motor Corp.*, No. 87-P-675 (Ohio Ct. C.P. Jan. 9, 1989); *Gingold v. Audi-NSU-Auto Union AG*, No. 6155 (Pa. Ct. C.P. May 12, 1988); *Groves v. Chrysler*, No. 84-7-302 (Or. Cir. Ct. March 15, 1988); *Little v. Chrysler*, No. 84-11-103 (Or. Cir. Ct. March 15, 1988); *Sutton v. Allenberg*, No. 6551 (Idaho Dist. Ct. Feb. 25, 1988); *Noone v. General Motors Corp.*, No. 85-68704 (Tex. Dist. Ct. Jan. 24, 1989); *McRoberts v. Ryals*, No. 86-1630-[illegible] (Tex. Dist. Ct. Oct. 13, 1988); *Garman v. Mazda Motor Corp.*, No. 85-13839-F (Tex. Dist. Ct. April 6, 1988); *Davis v. Whitworth*, No. 86-125-199 (Tex. Dist. Ct. July 19, 1988); *Perkins v. General Motors Corp.*, No. EAC 57623 (Cal. Super. Ct. Oct. 19, 1988); *Smith v. Towns*, No. 88CV-02-1011 (Ohio Ct. C.P. Oct. 24, 1988); *Hill v. Oakland County Road Comm'n*, No. 88-344327 NP (Mich. Cir. Ct. Nov. 9, 1988); *Seymour v. General Motors Corp.*, C.A. No. 86-2815 (R.I. Super. Ct. Sept. 26, 1988); *Mazey v. General Motors Corp.*, No. A 243811 (Nev. Dist. Ct. Dec. 6, 1988); *Mackey v. American Honda Motor Co.*, No. 83CV-08-4508 (Ohio Ct. C.P. Dec. 29, 1986); *Parker v. Evans*, No. OCV 36391 (Cal. Super. Ct. June 10, 1988); *McLaughlin v. General Motors Corp.*, No. LK-27-2 (Va. Cir. Ct. May 16, 1988); *Martinez v. Ford Motor Co.*, No. 87-893CW (Fla. Cir. Ct. Aug. 15, 1988); *Aronowitz v. General Motors Corp.*, Index No. 23118/84 (N.Y. Sup. Ct. Mar. 18, 1988); *Wolfe v. General Motors Corp.*, No. CV8720704 (Ohio Ct. C.P. Mar. 6, 1988); *Pederson v. Ford Motor Co.*, No. 3AN-85-15565 (Alaska Super. Ct. Sept. 24, 1987); *Ross v. Ford*

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but it did not. She says the decision threatens the vitality of *Erie*,[3] but it does not. She says the case will "thwart the evolving common-law of product liability" (Pet., p. 9), but it will not. She says that the courts are split on the airbag preemption issue, but they are not. Indeed, half the arguments petitioner makes are made for the first time in this Court, and none is sound.

The Tenth Circuit held airbag claims impliedly preempted (App., p. A5), following "the general principles" and "implied preemption rule" of the First Circuit in *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988). (App., p. A6) We respond to petitioner's arguments, to the extent they differ from those in the *Wood* petition.

A. The Argument That The Supreme Court Has Never Found Implied Preemption Where An Act Has A Savings Clause.

Petitioner declares that she "has been unable to find one case decided by this Court where preemption was found in the face of language as clearly and explicitly reflecting Congress' intent on preserving common law

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Motor Co., No. CV119361 (Ohio Ct. C.P. May 5, 1987); *Puzio v. General Motors Corp.*, No. L-07-2325-85 (N.J. Super. Ct. March 27, 1987); *Soboscienski v. Ford Motor Co.*, No. 2NO-85-246 (Alaska Super. Ct. Oct. 28, 1986); *Phillips v. Namie*, No. 85-33951-CA-07 (Fla. Cir. Ct. Sept. 22, 1986).

[3] *Erie Railroad Co. v. Tomkins*, 304 U.S. 64 (1938).

claims as that of § 1397(c) of the Safety Act."[4] (Pet., p. 7) If so, that is because petitioner has not looked, for it is settled law that a general savings clause like this one will not save common-law claims that conflict with federal law. *See, e.g., Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907) (Act provided "[n]othing in this act contained shall in any way abridge or alter the remedies now existing at common law . . . "; existing but conflicting common law remedy held preempted; general savings clause cannot "in reason be construed" in a way "inconsistent with the provisions of the act. . . . [An] act cannot be held to destroy itself"); *International Paper Co. v. Ouellette*, 479 U.S. 481, 496, 494 (1987) (Act provided "nothing in this section shall restrict any right which any person . . . may have under . . . common law"; Senate Report stated "compliance with . . . Act . . . would not be a defense to a common law action for . . . damages"; common law claims subjecting water discharger to "a variety of common law rules" along waterways would undermine Congress' purpose to achieve "clear and identifiable" discharge standards; Congress could not have "intended to undermine . . . [the Act] through a general savings clause"); *see also Taylor*, 875 F.2d at 827-28 n.20; *Wood*, 865 F.2d at 415; *Wickstrom*, 416 N.W.2d at 840.

Indeed, in *Abilene* and *Ouellette*, the statute at issue did not even have a preemption clause; here, the Act itself preempts a "State" from "enforcing" "any safety standard applicable to the same aspect of performance or item of equipment" not "identical" to an on-point federal standard. 15 U.S.C. § 1392(d). Petitioner ignores § 1392(d).

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[4] The statute's full name is the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1381 *et seq.*

B. The Argument That The Court Violated The Separation Of Powers.

Petitioner says that the Tenth Circuit "ignores the separation of powers" and "shifts the focus of inquiry under preemption analysis from what Congress intended to the court's own perception of proper policy." (Pet., pp. 7-8) This is the first we have heard about separation of powers in this case,[5] and it is nonsense. The Tenth Circuit adopted *Wood*, and *Wood* began its analysis of the issue by holding "[p]reemption is a matter of Congressional intent." *Wood*, 865 F.2d at 401. It went on to scrutinize Congress' purposes, as expressed in § 1397(c) and § 1392(d) (which petitioner ignores), and in the legislative history (which petitioner also ignores). 865 F.2d at 403-07. It concluded that "Congress's purposes . . . plainly imply a preemptive intent" here. 865 F.2d at 402.

C. The Argument That The Tenth Circuit's Decision Will "Send Us Back To Pre-Erie Days."

Petitioner says the decision below will "thwart the evolving common law of product liability" (Pet., p. 9), and send us "back to pre-*Erie* days." (Pet., p. 14) We agree that the common law is "a prized part of our Anglo-American legal heritage," but with all due respect to Pollock and Plucknett and Pound (Pet., p. 11), this case

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[5] This Court ordinarily will not exercise its jurisdiction to review issues not raised below. *Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984); *Heckler v. Campbell*, 461 U.S. 458, 469 n.12 (1983); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940); *Duignan v. United States*, 274 U.S. 195, 200 (1927).

has nothing whatever to do with the development of the common-law or *Erie*. Nobody said that federal substantive law governed petitioner's airbag claim on the merits; indeed, the district court held that petitioner's airbag claim was governed by New Mexico law on the merits, and that it "does not state a cause of action under New Mexico law" even if not preempted. (App., p. A9) Moreover, *Wood* made clear that federal preemption is "entirely different" from whether compliance with federal standards is a defense on the merits – a state law question. 865 F.2d at 417. Until now, no one even imagined that anyone thought this was an *Erie* case. It isn't.

Petitioner's claim that the holding in this case will have "great potential impact" on "many other areas in which Congress has enacted minimum design standards" (Pet., p. 11) is also fantasy. The implied preemption holding in *Wood*, adopted here, turns on Congress' intent as expressed in the language and history of the Safety Act, and is by its terms "narrow." 865 F.2d at 417. Even in that narrow arena, a "direct conflict between a common law design standard and a Safety Act performance standard" is "a rare event indeed." 865 F.2d at 402 n.9, 416-17.[6]

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[6] Plaintiff charges General Motors with a "coordinated campaign" to raise the preemption argument and defeat the common law. (Pet., pp. 3, 8, 16) General Motors has simply raised the defense when plaintiffs have filed these cases. In fact, it is petitioner's *amici* (Pet., p. 5) who have mounted a "coordinated campaign" to use the common law to bypass Congress' regulatory plan, and reopen in the courts the mandatory airbag issue the Department of Transportation resolved in adopting a rule allowing either seat belts or airbags. *See, e.g.*,

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Indeed, this case belies petitioner's claim that the Tenth Circuit's decision will "thwart" product liability law and leave injured people "without any remedies whatsoever." (Pet., p. 9) Petitioner had no airbag claim under state law, but she had a state-law remedy – a claim that the seat belts in the car were defective. She tried that claim to a jury, and lost. Now she has appealed to the Tenth Circuit, asking it to reverse that common-law jury verdict. That appeal is pending; it will, of course, be decided, under *Erie*, under state law.

D. The Argument That There Is No Preemption "Even Where A Federal Judge Determines That The State Policy Is In Conflict With The Federal Policy."

Petitioner next announces that there cannot be preemption "even where a federal judge" determines "that the state policy is in conflict with the federal policy" (Pet., p. 10), in particular "in those areas that have been traditionally reserved to state supervision." (Pet., p. 13)

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Teret & Downey, *Air Bag Litigation*, 18 Trial (July 1982) at 93. As explained in the article entitled *The Air Bag Goes To Court*, N.Y. Times, Oct. 29, 1984, § D at 1, col. 4:

> [A] small group of trial lawyers from around the nation has quietly developed a new strategy that they hope will move the airbag question out of the regulatory agencies and into the courts. . . . "We are trying to use economic pressure to force them to offer airbags," said Joan Claybrook, . . . one of the leading forces behind the campaign [and a founder of Trial Lawyers for Public Justice].

But a state law that conflicts with federal policy "is preempted by direct operation of the supremacy clause," *Brown v. Hotel & Restaurant Employees and Bartenders International Union*, 468 U.S. 491, 501 (1984), regardless of the importance to the state of its own law.

> The relative importance to the state of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.

Free v. Bland, 369 U.S. 663, 666 (1962). *Accord Felder v. Casey*, ___ U.S. ___, 108 S. Ct. 2302, 2306 (1988) ("any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield"); *see also Taylor*, 875 F.2d at 826; *Wood* Opposition at 25 n.19.[7] That is what federal supremacy means.

E. The Argument That "The Courts Have Substantially Divided In Result."

Finally, petitioner argues that "the issue has been raised in more than twenty cases and the courts have substantially divided in result." (Pet., p. 16) Petitioner appears not to have updated her survey since 1987. In fact, there now have been over fifty cases, and there is

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[7] Petitioner says the court of appeals "wholly ignores" the presumption against preemption (Pet., p. 15), but that is wrong. The court of appeals followed *Wood*, and *Wood* declined to find express preemption by § 1392(d) because it found no "specific intent in section 1392(d) expressly to preempt an action of the present type." 865 F.2d at 407. That is exactly what the presumption against preemption instructs courts to do.

virtual unanimity that airbag claims are preempted. *See* pp. 2-3 & n.2, above. Of the reported cases alone, petitioner omits all the state appellate cases – *Nissan Motor Corp. v. Superior Court, Gardner,* and *Wickstrom* – and the recent federal district court cases – *Pokorny, Surles, Kelly, Kolbeck, Heftel, Hunter,* and *Howard. See* pp. 2-3, above.

Petitioner cites eleven "cases." (Pet., p. 16-17) All but two[8] are unpublished summary orders, and all issued before any appellate case was decided. Several have since been reversed, overruled, or superseded by appellate decisions or federal opinions in the jurisdiction. *See Seemann v. General Motors Corp.*, No. 86-6145 (CL) "AI" (Fla. Cir. Ct. August 31, 1989) (granting motion for reconsideration, vacating earlier decision, and granting summary judgment against passive restraint claim); *Honda Motor Co. v. Kimbrel,* 189 Ga. App. 414, 376 S.E.2d 379 (Ct. App. 1988) (reversing trial court denial of summary judgment on state-law duty grounds, and citing *Cox,* above, on preemption issue; petitioner mistakenly identifies this as Texas case); *Burge v. Blight,* No. 41-74-75 (Cal. Super. Ct. June 30, 1987) (superseded by *Nissan Motor Corp. v. Superior Court,* above); *Lynch v. Mims,* No. GCG 85-0019 (Fla. Cir. Ct. Aug. 20, 1985) (decided before *Seemann* and *Martinez,* n.2, above, and Eleventh Circuit decision in *Taylor*); *Steenbergen v. Ford Motor Co.*, No. 85-15718-C (Tex. Dist. Ct. June 30, 1986) (decided before Texas federal district court decisions in *Bass* and *Surles,* and state court decisions in *Noone, McRoberts, Garman* and *Dallas,*

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[8] *Murphy v. Nissan Corp.*, 650 F. Supp. 922 (E.D.N.Y. 1987), is on analysis a reclining seat, not passive restraint, case. *Garrett v. Ford Motor Co.*, 684 F. Supp. 407 (D. Md. 1987), is a rear seat belt, not passive restraint, case.

n.2, above); *Munson v. Pearcy*, No. B-840,570 (Tex. Dist. Ct. May 15, 1986) (same); *Picadio v. General Motors Corp.*, No. GD 85-14613 (Pa. Ct. C.P. Dec. 28, 1987) (decided before Pennsylvania federal court decisions in *Kolbeck* and *Pokorny*, and state court decision in *Gingold*, n.2, above).

There is virtual unanimity here.

F. Even If There Were Some Issue To Review, This Is Not The Appropriate Case To Review.

Even if there were an issue to review, this would not be an appropriate case in which to grant certiorari. First, the district court held that even if petitioner's claim were not preempted, it would state no claim under New Mexico (the applicable state) law. (App., p. A9) The Tenth Circuit did not reach that issue, for it did not have to. (App., p. A5 n.4) However, the Tenth Circuit would have given great deference to the New Mexico district judge's view of local law. *Mullan v. Quickie Aircraft Corp.*, 797 F.2d 845, 850 (10th Cir. 1986); *Wells Fargo Business Credit v. American Bank of Commerce*, 780 F.2d 871, 874 (10th Cir. 1985).[9] There is no reason to grant review here, where even if the preemption ruling were reversed, the airbag claim does not state a claim as a matter of state law anyway.

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[9] The district court's ruling also accords with holdings in other jurisdictions, applying the law of other states, that airbag claims are not cognizable. *See, e.g., Schwartz v. Volvo N. Am. Corp.*, ___ So. 2d ___, No. 87-1272 (Ala. 1989); *Honda Motor Co. v. Kimbrel*, 189 Ga. App. 414, 376 S.E.2d 379 (Ct. App. 1988); *Kern v. General Motors Corp.*, 724 P.2d 1365 (Colo. App. 1986); *Hughes v. Ford Motor Co.*, 677 F. Supp. 76 (D. Conn. 1987);

(Continued on following page)

Second, petitioner has an appeal pending from the defense verdict on her defective belt claim. *See* p. 9, above. If the Tenth Circuit were to reverse, and petitioner to prevail on remand, any decision on the preemption issue by this Court would be moot. The Court should not grant review where its decision may be mooted by proceedings below.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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Thomas v. Subaru of Am., Inc., 655 F. Supp. 22 (E.D. Tenn. 1985), *aff'd per curiam*, 815 F.2d 80 (6th Cir. 1987); *Higgs v. General Motors Corp.*, 655 F. Supp. 22 (E.D. Tenn. 1985); *Hunter v. General Motors Corp.*, Prod. Liab. Rep. (CCH) ¶ 12,039 (D. Conn. Dec. 27, 1988).

RULE 28.1 LIST OF PARTIES

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